STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE NO. 6-98

POLSON CLASSIFIED EMPLOYEES ASSOCIATION, MEA/NEA,

Appellant / Complainant,

- vs -

POLSON PUBLIC SCHOOLS, ELEMENTARY & HIGH SCHOOL DISTRICT NO. 23, LAKE COUNTY, MONTANA,

Respondent / Defendant.

FINAL ORDER

* *

The above-captioned matter came before the Board of Personnel Appeals on December 9, 1999. Karl Englund, attorney for the Complainant/Appellant, appealed from the Findings of Fact, Conclusions of Law and Recommended Order issued by a Department hearing officer, dated July 13, 1999.

Appearing before the Board were Karl Englund, attorney for the Complainant/Appellant and Arlyn Plowman of the Montana School Boards Association representing the Defendant/Respondent. Both parties participated in person.

After review of the record and consideration of the arguments by the parties, the Board concludes that the record supports the decision of the Hearing Officer. Accordingly, the Board orders as follows:

1. **IT IS HEREBY ORDERED** that the Board adopts the Findings of Fact, Conclusion of Law, and Recommended Order issued by the Hearing Officer.

2. **IT IS FURTHER ORDERED** that the Exceptions to Proposed Findings of Fact, Conclusions of Law and Order on Remand are dismissed.

DATED this 17th day of December, 1999.

BOARD OF PERSONNEL APPEALS

By: _____
Jack Holstrom
Presiding Officer

* *

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE NO. 6-98:

POLSON CLASSIFIED EMPLOYEES' ASSOCIATION, MEA/NEA, Complainant,	)	
vs.	)	ORDER
POLSON PUBLIC SCHOOLS, ELEMENTARY & HIGH SCHOOL DISTRICT NO. 23, LAKE COUNTY, MONTANA, Respondent.	)	

* *

The above-captioned matter came before the Board of Personnel Appeals on January 28, 1999. The Respondent appealed from the Findings of Fact, Conclusions of Law and Order issued by a Department hearing officer, dated September 30, 1998.

Appearing before the Board were Arlyn Plowman, representing the Respondent, and Karl J. Englund, attorney for the Complainant. They participated in person.

After review of the record and consideration of the arguments by the parties, the Board concludes that the Department hearing officer's findings of fact are supported by substantial evidence. Certain conclusions of law and the rationale expressed by the hearing officer in the "Discussion" portion of his ruling, however, are deemed legally incorrect. Specifically, the Board finds as incorrect Conclusions of Law #2 and #3, together with that portion of the "Discussion" running from page 19, line 10 through page 20, line 5 and from page 20, line 22 through page 21, line 20.

As a result of the above conclusions the Board orders as follows:

1. **IT IS HEREBY ORDERED** that:

This case is remanded to the Department hearing officer with directions to comport his ruling to the following conclusions of the Board:

A. That section 5.3 of the contract constituted a valid waiver to bargain by the Association on the issues expressly set forth therein;

B. That the School District complied with the terms of Section 5.3 when it sought the input of the Association regarding the District's efforts to modify duties and responsibilities of the aides and paraprofessionals; and

C. The district did not bypass the association and deal inappropriately or directly with the employees.

2. **IT IS FURTHER ORDERED** that:

A. the Department hearing officer shall, on remand, determine whether any other unilateral actions by the School District exceeded the express waiver contained within section 5.3 of the contract. If so, such behavior could constitute an unfair labor practice.

DATED this 16 day of February, 1999.

BOARD OF PERSONNEL APPEALS

BY: James A. Rice, Jr.
James A. Rice, Jr.
Presiding Officer

* *

Board members Rice, Talcott and Vagner concur.
Board members Schneider and Perkins dissent.

* *

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CERTIFICATE OF MAILING

I, Jennifer Jacobson, do hereby certify that a true and correct copy of this document was mailed to the following on the 18th day of February, 1999:

KARL J ENGLUND
ATTORNEY AT LAW
PO BOX 8358
MISSOULA MT 59807-8358

ARLYN PLOWMAN
MONTANA SCHOOL BOARDS ASSOCIATION
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* *

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE NO. 6-98:

POLSON CLASSIFIED EMPLOYEES' ASSOCIATION, MEA/NEA, Complainant, vs. POLSON PUBLIC SCHOOLS, ELEMENTARY & HIGH SCHOOL DISTRICT NO. 23, LAKE COUNTY, MONTANA, Respondent.	FINDINGS OF FACT; CONCLUSIONS OF LAW; AND RECOMMENDED ORDER

* * * * * * * * * * *

I. INTRODUCTION

On August 11, 1997, the Polson Classified Employees Association (Association), an affiliate of the Montana Education Association and the National Education Association, filed an unfair labor practice charge with the Montana Board of Personnel Appeals (Board) alleging that the Polson Public Schools, Elementary and High School District No. 23 of Lake County, Montana (School District), violated § 39-31-401(1) and (5), MCA, by refusing to bargain in good faith with the exclusive collective bargaining representative.

The complaint asserted that the School District unilaterally changed working conditions by revising job descriptions for instructional, non-instructional, and paraprofessional aides without bargaining with the Association. The complaint further alleged that after refusing to bargain with the Association, the School District

attempted to bargain with individual members of the collective bargaining unit, bypassing the exclusive bargaining representative.

The School District responded that under the collective bargaining agreement, it had the authority to implement the changes in the affected job descriptions. In particular, the School District pointed to Section 5.3 of the collective bargaining agreement and contended that it waived the Association's right to bargain about changes in job duties and responsibilities.

On December 25, 1997, the Board issued its investigation report and determined probable merit to the charge. Pursuant to § 39-31-405, MCA, this case was referred to the Hearings Bureau, and Hearing Officer Gordon Bruce conducted an evidentiary hearing on June 18, 1998.

In September 1998, the Hearing Officer issued findings of fact, conclusions of law and recommended order, concluding that the School District refused to bargain with the Association over changes in job descriptions and duties and attempted to bypass the Association and bargain directly with individual bargaining unit members. The School District filed exceptions to the Hearing Officer's decision, and the matter was argued before the Board on January 28, 1999. The Board adopted the Hearing Officer's findings of fact, but amended the conclusions of law and issued an order holding:

A) That section 5.3 of the parties' collective bargaining agreement constituted a valid waiver by the Complainant of any obligation the Defendant may have had to bargain on the issues exactly expressly set forth therein;

B) That the Defendant complied with the terms of section 5.3 when it sought the Complainant's input; and

C) The Defendant did not bypass the Complainant and deal directly with bargaining unit members.

Thereafter, the Board remanded the matter to the Hearing Officer to determine whether any other unilateral actions by the School District exceeded the express waiver contained within Section 5.3 of the parties' collective bargaining agreement.

Pursuant to a March 18, 1999 order and a subsequent April 1, 1999 rescheduling order, Hearing Officer Gordon Bruce held a telephone conference on April 6, 1999. At the conference, the representatives of the parties stipulated to the following:

> The issue to be determined on remand is whether the employer/defendant exceeded the express waiver contained in Section 5.3 of the collective bargaining agreement when it discontinued or combined job titles referenced in the unit description, and if so, whether such behavior constitutes an unfair labor practice.
>
> That the record is sufficient for a decision on the merits without any further fact finding hearing.

The findings of fact in the decision on remand from the Board are incorporated by reference in this decision and may be repeated for clarification. The Hearing Officer has made some additional findings of fact derived from the record of the hearing.

II. FINDINGS OF FACT

1. In August of 1995, the Association and the School District agreed to negotiate a single collective bargaining agreement covering the affected employees. The School District eliminated its only paraprofessional position when it hired a new mathematics teacher. This change occurred before the Association was certified as the exclusive representative for any of the School District's employees. Eventually, the parties reached a three-year agreement covering both units, covering the 1995-

1996, 1996-1997 and 1997-1998 school years. The parties had three collective bargaining agreements, two covering transportation and clerical employees, and a third covering transportation and clerical employees and instructional, non-instructional aides, and paraprofessionals.

2. The third round of negotiations in 1995 began prior to the certification election for the aide and paraprofessional unit and prior to the agreement to combine the transportation and clerical unit with the aide and paraprofessional unit. When the aide/paraprofessional unit was certified, the new unit made a series of proposals designed to include the new unit members in with the existing unit, including a proposal to amend the recognition clause of the contract and specifically list "teacher aides (instructional and non-instructional) *and* paraprofessionals" as separate job categories.

3. The School District responded with a proposal to delete any reference to paraprofessionals. The School District argued that there should be no distinction between aides and paraprofessionals. The Association rejected that idea, based in part on the fact that the unit as certified by the election and by the Board consisted of two separate job classifications -- aides and paraprofessionals. While the Association was willing to establish a committee to study the job duties of the paraprofessional, it was not willing to agree to abandon all distinctions between the dwindling ranks of the paraprofessionals and the aides.

4. In response, the School District proposed including in the recognition clause the job classification of paraprofessionals "as may be defined by the District." The Association did not agree with this language because of its perception that it allowed the School District unlimited right to define the job of the paraprofessional. The Association proposed again that paraprofessionals be listed in the recognition clause as a separate job classification. Finally, the School District agreed and the

contract lists paraprofessionals and aides as separate job classifications. The paraprofessionals acted as assistant teachers.

5. The School District assigned the former paraprofessional position duties similar to those of an aide. Before the School District developed the new job descriptions, it assigned the paraprofessional employee lunchroom duty for the 1996-97 school year. The School District did not make significant changes in the former paraprofessional's duties under the job description when it included custodial-type duties, including cleaning lunchroom tables.

III. DISCUSSION

The Board has jurisdiction over this unfair labor practice charge. § 39-31-406, MCA. The School District is a public employer as that term is defined in § 39-31-103(10), MCA, its employees are public employees as that term is defined in § 39-31-103(9), MCA, and the Association is an exclusive representative as that term is defined in § 39-31-103(4), MCA.

Section 39-31-401(5), MCA, provides that it is an unfair labor practice for an employer to "refuse to bargain collectively in good faith with an exclusive representative." An employer violates its duty to bargain if, without bargaining to impasse, it changes unilaterally an existing term or condition of employment which is a mandatory subject of bargaining. See NLRB v. Katz, 369 U.S. 736 (1962) (stating that such action is "a circumvention of the duty to negotiate which frustrates the objectives of § 8(a)(5) much as does a flat refusal"); Bigfork Area Education Association v. Board of Flathead and Lake County School District No. 38, ULP #20-78.

The waiver of a statutory right must be clear and unmistakable. Metropolitan Edison Co. v. NLRB, 460 U.S. 708 (1983). Generally worded management rights clauses or "zipper" clauses will not be construed as waivers of bargaining rights.

Suffolk Child Development Center, 277 NLRB 1345 (1985); Kansas National Education Association, 275 NLRB 638 (1985); Bozeman Deaconess Foundation, 322 NLRB No. 196 (1997). Waiver may be evidenced by bargaining history, but the matter at issue must have been fully discussed and consciously explored during negotiation and the union must have consciously yielded or clearly and unmistakably waived its interest in the matter. Rockwell International Corp., 260 NLRB 1346, 1347 (1982).

The bargaining unit description in the parties' collective bargaining agreement is found in the second paragraph of Article I where it states:

> The appropriate unit shall include all custodians, maintenance workers, bus drivers, mechanics, secretaries, and other employees performing work of a clerical nature, including but not limited to hot lunch aide and office aide, all teacher aides (instructional and non-instructional) and paraprofessionals employed by the Polson Elementary and High School District No. 23, excluding cooks, dishwashers, food servers, the superintendent's secretary, the clerk/business manager and assistant, the transportation director and any employee excluded by 39-31-103, MCA.

The Complainant contends that because the initial bargaining unit certified by the Board included both aides and paraprofessionals, the School District could not unilaterally discontinue or combine job duties in the unit.

In Newspaper Printing Corporation v. National Labor Relations Board, 692 F.2d 615, 111 LRRM 2824 (6th Cir. 1982), the Sixth Circuit Court of Appeals stated:

> We believe that the following comment by the [National Labor Relations] Board regarding unit certification, quoted with approval by the Supreme Court, applies as well to voluntary recognition and places this dispute in the proper light:

> "[A] Board certification in a representation proceeding is not a jurisdictional award; it is merely a determination that a majority of the employees in an appropriate unit have selected a particular labor organization as their representative for purposes of collective bargaining. It is true that such certification presupposes a determination that the group of employees involved constitute an appropriate unit for collective bargaining purposes, and that in making such a determination the Board considers the general nature of the duties and work tasks of such employees. However, unlike a jurisdictional award, this determination by the Board does not freeze duties or work tasks of the employees in the unit found appropriate. Thus, the Board's unit finding does not per se preclude the employer from adding to, or subtracting from, the employees' work assignments." (Emphasis added)

The unit description found in Article I of the parties' collective bargaining agreement specifies those employees who are members of the bargaining unit represented by the exclusive representative, the Association. The unit description does not establish any wages, hours or working conditions; it merely identifies those employees represented by the Association. The unit description does not preclude the School District from adding to, or subtracting from, the employees' work assignments. Newspaper Printing Corporation v. National Labor Relations Board, supra, Bridgeport and Port Jefferson Steamboat Company, 313 NLRB 63, 145 LRRM 1004 (1993); Alamo Cement Company, 277 NLRB 108, 121 LRRM 1131 (1985).

Although the School District had previously eliminated its last paraprofessional position, paraprofessionals were included in the bargaining unit certified by the Board in July 1995. The previous job title and job description were for a job that no longer existed and the new job description and job title more accurately reflected the incumbent's current job duties and responsibilities.

The Complainant also contends that the School District could not discontinue or combine position titles because of the "zipper" clause contained in the collective bargaining agreement.

The fact that the positions were included in the unit determination does prevent the School District from altering the duties of the position. However, the Board has already determined that the Association waived its right to bargaining about job descriptions, discontinuation or combination of job titles, and work assignments with the following contract language in Section 5.3, Work Day - Work Year - Work Week - Breaks, as follows:

> The School District will assign hours of work, number of days of work, length of work, job responsibility, and/or duties. The hours of work, number of days of work, the length of work, job responsibility, and/or duties may be changed by the School District after seeking the Association's input.

Here, the Board determined that the language in Section 5.3 constituted a valid waiver by the Association of any obligation the School District may have had to bargain on the issues expressly set forth therein. Job responsibilities and duties are expressly set forth in Section 5.3. If the Association waived its right to bargaining regarding job responsibilities and job duties, it follows that the document describing those duties, the job description, is also within the scope of the waiver.

The Association proposed contract language to limit the School District's § 39-31-303, MCA, rights to direct and assign employees, determine the job classifications and personnel by which District operations were to be conducted, when it proposed to negotiate job descriptions for each bargaining unit position. The Association's proposal regarding job descriptions and its failure to have them included in the contract establishes that the School District successfully protected its employer's § 39-31-303, MCA, prerogatives. This bargaining history constitutes an

additional waiver on the whole issue of job descriptions, Radiocar Corporation, 199 NLRB 137, 87 LRRM 1330 (1974); Westinghouse Electric Corporation, 150 NLRB 136, 58 LRRM 1257 (1965).

There is nothing in the parties' collective bargaining agreement nor in the record that requires the School District to maintain obsolete job titles or job descriptions. In summary, the School District did not exceed the waiver contained in Section 5.3 of the collective bargaining agreement when it discontinued or combined job duties referenced in the unit description.

IV. CONCLUSIONS OF LAW

1. The Board has jurisdiction over this unfair labor practice charge. § 39-31-406, MCA.

2. The School District did not violate § 39-31-401 (1) and (5), MCA, when it discontinued or combined job titles referenced in the unit description.

V. RECOMMENDED ORDER

Unfair Labor Practice Charge No. 6-98 is hereby Dismissed.

DATED this 13th day of July, 1999.

BOARD OF PERSONNEL APPEALS

By: Gordon D. Bruce

GORDON D. BRUCE
Hearing Officer